

IN THE
Supreme Court of the United States
OCTOBER TERM, 1969

No. 1435

D. H. OVERMYER Co., INC., of Ohio,
and
D. H. OVERMYER Co., INC., of Kentucky, *Petitioners*
v.

FRICK COMPANY, a Pennsylvania Corporation,
Respondent

PETITIONERS' REPLY BRIEF ON CERTIORARI

Four reasons assigned by respondent opposing review by this Court demonstrate the critical need for constitutional light in this dark and blighted area of constitutional jurisprudence. Respondent argues the merits of due process as applied below and of course this is the very purpose of the petition. This Court should fully consider the merits, with the aid of briefs from both sides.

Respondent argues (Br. 10-13) that petitioner's signature on the note was a waiver of the due process protection; but of course there never was a waiver of the right to fair and honest performance of respondent's obligation. Nor was there a waiver of meritorious defenses to a suit on the note.

Respondent's Point 4 (p. 14) argues that review should not be granted because "This is not a consumer protection or wage earner case." Respondent corporation is claiming that petitioner has no constitutional right to notice and hearing because it is a corporation. Such a distinction has never been sanctioned under the Fourteenth Amendment. Certainly, assumption of the corporate form shouldn't make this petitioner liable to pay for worthless goods, and strip it of defenses which other persons have before the law.

Actually, Overmyer is a small family company, heavily mortgaged, founded within the last ten years, and still owned and operated by a single individual and his immediate family. How "sophisticated" it is, as respondent claims (Br. 14), may be judged from its necessity and willingness to sign such a note as the one here in issue. It speaks here in a real sense for small business, struggling to live, fighting to preserve vital credit channels against the same kind of overreaching condemned so recently by this Court in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

Since the filing of the petition herein, counsel has learned of the pendency in Pennsylvania federal courts of two suits, under sponsorship of the Federal Government's Office of Economic Opportunity, seeking to declare unconstitutional precisely the same kind of cognovit note at issue here on the same grounds alleged in this case.

Awaiting imminent decision by a 3-judge court in the Eastern District is the case of *Swarb v. Lennox*, No. 69-2981, where the court has issued a preliminary injunction, after hearing, to bar execution on confession of judgment by natural persons, except with regard to mortgages. This is a class action by 40 named individual plaintiffs, for themselves and all others similarly situated. A decision is expected within the next week.

Identical action is pending in the Western District case of *Mallon v. Coon*, No. 70-503, where a similar injunction has been issued.

In the Eastern District the record shows over 52,000 judgments by confession were taken in Philadelphia in 1968, while the number recorded in 1969 was about 48,000. In the less populous Western District 26,432 judgments on confession were entered in 1968; and 25,944 were recorded in 1969.¹

Since these cases have access to this Court as a matter of right on direct appeal (28 U.S. Code, § 1253), the matter is obviously of considerable consequence and virtually certain to engage this Court's consideration during the next term. Review by this Court will be in the highest public interest and national importance, providing a needed constitutional guide for all the States.

It is prayed that certiorari issue to bring this case up from the State Courts of Ohio in order that it may be considered at the same time, and in the same per-

¹ Information and data on these cases was supplied by counsel for plaintiff via long distance telephone.

spective and principle, as the Pennsylvania cases now developing in the federal forum.

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MOTION TO POSTPONE CONSIDERATION

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After the filing yesterday, June 1, of Petitioner's Reply Brief on Certiorari, counsel was informed this morning by long distance telephone that the 3-judge District Court sitting in the Eastern District of Pennsylvania has filed an opinion on the merits of the Government's suit to declare unconstitutional confessions of judgment rendered on promissory notes without notice and hearing.